

ANTITRUST AND UNFAIR COMPETITION CONDUCT IN THE NETWORK GAME INDUSTRY IN CHINA



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Antitrust and Unfair Competition Conduct in the Network Game Industry in China

By Vanessa Yanhua Zhang & John Jiong Gong

We introduce two related cases between a video game company and a live broadcasting company in China that were fought in terms of both Anti-Monopoly Law and Anti-Unfair Competition Law, involving Copyright Law. The High Court rulings indicate that it generally does not conduct relevant market definition based on one game alone, and that it treats animated moves embedded in games as copyright-protected content. These conclusions will have a profound impact on the broadcasting industry in terms of its implications to business models and revenue streams.

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I. INTRODUCTION

The gaming industry has gone through dramatic growth over the years in China. In 2020, total gaming market revenue has reached RMB 278.7 billion, or US\$ 42.7 billion, a 20.7 percent growth over the previous year.² About RMB 209.7 billion is associated with mobile gaming, accounting for about 75.2 percent of the market.³ The game broadcasting market has seen even better growth in 2019, having reached a market size of RMB 20.8 billion, or US\$3.0 billion.⁴ Both markets are relative competitive with no significant barriers of entries, considering the upfront cost is not high and the R&D cycle is generally short. While both industries have been enjoying their good days so far, the relations between the two sides are contentious so far.

The game owners would certainly like to monetize the revenue opportunities in live broadcasting businesses via enforcing copyright protections and developing their own broadcasting platforms in competition. The broadcasters respond by further investing in developing a community of star players aka broadcasting anchors. They have also responded along the legal front by invoking antitrust weapons. At the forefront of this inter-industry battle is the NetEase-Huaduo (“YY”) rivalry. Several lawsuits between the two companies have led to court rulings. In this short article, we provide a brief analysis of two recent lawsuits involving these two companies. One regards unfair competition by NetEase against YY based on unauthorized copyright infringement, which eventually resulted in a favorable court ruling for NetEase. As a strategic arrangement, the legal battle festers into the antitrust arena, with YY claiming that NetEase has been engaged in abuse of market dominance behaviors. We introduce these two related cases and provide some analysis with respect to its legal and economic implications for the industry.

II. CASE BACKGROUND

NetEase is one of the top game developers in China. The game “Fantasy Westward Journey” was one of the most popular games in China since its launch in 2003. Guangzhou Huaduo Network Technology Co. Ltd. (“YY”) operated a popular game live broadcasting platform “YY” in China, where the “Fantasy Westward Journey II” had been broadcasted since 2012. On November 24, 2014, NetEase sued YY at the Guangzhou Intellectual Property Court (hereinafter referred to as “the Guangzhou IP Court”), alleging that YY infringed NetEase’s copyright of “Fantasy Westward Journey II” through illegally transcribing and capturing the content of this game and broadcasting live on its broadcast platform YY. NetEase also alleged that YY’s conducts constituted unfair competition. NetEase sought a court judgment that YY should indemnify NetEase for damages in the amount of RMB 100 million and issue an apology on designated websites.

The key dispute between the two parties was whether the motion images presented in the game at issue can be considered as copyrighted works just like film works. On October 24, 2017, the Guangzhou IP Court determined that these images do constitute copyrighted works and NetEase is the right licensor. The Guangzhou IP Court ordered YY to stop the infringement behavior and compensate NetEase for damages in the amount of RMB 20 million.⁵

Both NetEase and YY appealed to the Guangdong High People’s Court (hereinafter referred to as “the High Court”) for a second trial. On January 17, 2018, the appeal was accepted by the High Court. NetEase insisted its damage claim of RMB 100 million and the request of a public apology. YY appealed to the High Court to reject all NetEase’s claims or remand the case for retrial. On December 10, 2019, the High Court issued its final decision on this case and upheld the ruling of the first trial.⁶

Shortly after NetEase’s first copyright and unfair competition lawsuit, YY fought back with a lawsuit against NetEase at the Guangzhou Intellectual Property Right Court, alleging that NetEase abused market dominance and had been engaged in unfair competition conducts too. The alleged abuses included prohibiting users from broadcasting the game “Fantasy Westward Journey II” on the YY platform and bundling the “Fan-

² Game Publishing Committee of the China Audio-Video and Digital Publishing Association, “2020 China Gaming Industry Report,” December 18, 2020, <http://www.cgigc.com.cn/gamedata/22132.html>.

³ Game Publishing Committee of the China Audio-Video and Digital Publishing Association, “2020 China Gaming Industry Report,” December 18, 2020, <http://www.cgigc.com.cn/gamedata/22132.html>.

⁴ iResearch, “China Game Broadcasting Industry Report,” July 2020, at p.7, http://report.iresearch.cn/report_pdf.aspx?id=3625.

⁵ See the first instance judgement in *NetEase v Huaduo*, Guangzhou Intellectual Property Court, Civil Judgment (2015) Yue Zhi Fa Zhu Min Chu Zi No. 16, October 24, 2017.

⁶ See the second instance judgement in *NetEase v Huaduo*, Guangdong High People’s Court, Civil Judgment (2018) Yue Min Zhong No. 137, December 10, 2019, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=8c109eabfe124d6a987eab3100fe7b13>.

tasy Westward Journey II” with NetEase’s own CC live broadcast platform software. YY argued that the said abuses also violated the Anti-Unfair Competition Law. The unfair competition conduct also manifests in NetEase’s CC platform imitating the YY platform in its overall design and page layout. YY sought a damage compensation of RMB 10 million plus other reasonable expenses of RMB 0.3 million.

On November 28, 2017, the Guangzhou IP Court rejected all YY’s claims. The Guangzhou IP Court defined the relevant market as the network game service market in the mainland China as opposed to the market of the particular game at issue, and consequently YY failed to prove that NetEase held market dominance in the relevant market. The Guangzhou IP Court also supported NetEase’s right to prohibit others from broadcasting its game without authorization. And the alleged bundling behavior didn’t meet the conditions of bundling under the Anti-Monopoly Law (“AML”). The Guangzhou IP Court also rejected the allegation of NetEase’s unfair competition conducts.⁷ On May 28, 2020, the High Court rejected the appeals of YY and upheld the conviction of the first trial.⁸

III. CASE ANALYSIS

As described in the section above, the conflicts between NetEase and YY involve both unfair competition and antitrust issues. We will analyze each case based on the alleged conducts and discuss if and why certain conducts are ruled legitimate or not.

A. Copyright and Unfair Competition Issues

The unfair competition case was brought by NetEase against YY for its infringement conduct of using its copyrighted game content for broadcast online without authorization. Fantasy Westward Journey II is arguably one of the most successful games in the network gaming market in China. NetEase released the first version of Fantasy Westward Journey in 2003. Ever since then, it has become one of the important revenue generators for NetEase, ranked as the second most popular game by revenue in 2019 in China.⁹ There have been several important channels to distribute games in China. One channel is direct distribution. Here, game players can download the game directly from the game’s official websites by searching interested game’s name, or from the third-party traffic ads apps or websites such as TapTap and Douyin etc., which will direct users to the games’ official websites for downloading. The other channel is to download the games directly via app stores such as OEMs’ app stores like Huawei’s Apps Gallery and Apple’s App Store, or third-parties’ app stores like Tencent’s MyApp and 360 Mobile Assistant.

In the direct distribution channel, NetEase spent quite a large amount of resources on advertisement expenses on third party apps or websites such as social network platforms, like Douyin, YY and etc. The industry calls it traffic purchase, which means that game developers pay to the apps or websites to bring new users via downloading (cost per download) or clicking (cost per click). Meanwhile, there are gaming communities on the SNS (Social Network Service) platforms where game players gather in chat rooms to watch game anchors to broadcast in a live streaming pattern. Some SNS platforms even organize and sign contracts with these game anchors and regularly broadcast game matches. Naturally, popular online games become the main content input of those matches during live streaming events and the SNS platforms usually split the revenues with game anchors. Majority of the revenues come from audience’s tipping to game anchors, mainly from game players and game enthusiasts. YY is one of those SNS platforms which operate the broadcasting business by sharing the revenue with those game anchors and/or also by selling advertising slots.

YY is a multi-sided platform which connects audiences, i.e. game players or game enthusiasts and game anchors. It also attracts general audiences and other entertainment anchors whose focus could be on sports, music, dance, food and cooking, and skin products etc. Gaming, however, accounts for the largest activities on its platform and it has devoted more resources to boost the development of gaming ecosystems.

In the unfair competition case, NetEase’s main allegation is that YY has infringed NetEase’s copyrights by organizing and allowing game anchors to use unlicensed game content of Fantasy Westward Journey II to broadcast on YY’s platform. It also alleged that it is illegal under the Anti-Unfair Competition Law in China.

⁷ See the first instance judgement of *Huaduo v NetEase*, Guangzhou Intellectual Property Court, Civil Judgment (2015) Yue Zhi Fa Min Chu Zi No. 25, November 28, 2017.

⁸ See the second instance judgement of *Huaduo v NetEase*, Guangdong High People’s Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

⁹ Nan Lu, “2019 Global and China Mobile Game Market Trends Report,” Sensor Tower, January 22, 2020, https://mp.weixin.qq.com/s/iNv7cHQa_VfG3RogM5ATCg.

The focus of the legal issues in this case regards:

- i) whether the animated pictures of Fantasy Westward Journey II are considered as copyrighted works;
- ii) whether broadcasting of copyright protected content for obvious commercial purposes is considered as proper use.

Regarding issue (i) above, the Guangdong High Court confirmed the decision of the court of first instance, that animated pictures of Fantasy Westward Journey II should be considered as copyright protected content. The Court stated that Fantasy Westward Journey II is a role-playing online game and the continuous animated pictures of the game are qualified to have the key characteristics of a series of music-accompanied or non-music-accompanied pictures. The process of producing such animated pictures and the final expression in audio and video combination demonstrates a high-level originality and creativity. It falls into the category of literacy and art, possessing unique elements of originality and creativity in terms of tangible and duplicable intellectual products. Essentially it's similar to the movie products that are protected by the Copyright Law.

Regarding issue (ii) above, the Guangdong High Court acknowledged that live broadcasting is a way of communication with the public in real time. Live broadcasting games is in fact distributing the products or works in a public way. Live broadcasting does not fall into the categories of exhibition right, projecting right, performing right, broadcasting right or distribution right via information network, which are protected by the Copyright Law. It belongs to other rights that are possessed by the copyright owner but does not belong to any scenarios prohibited by Article 22 of the Copyright Law.¹⁰ The live broadcasting conduct, by using NetEase's copyrighted content on YY's platform, is as a matter of fact for business profit purpose. The usage volume has exceeded the proper use limit. Such conduct has infringed upon the normal licensing right that NetEase possesses on the game pictures involved in the case. It therefore harms revenues of NetEase's potential market, which could not be considered as proper usage.¹¹

During the appeal process, along with other additional evidence YY submitted an economic report which intended to demonstrate that game broadcasting is not a substitute for game but creates its own value to the distribution of the games based on a consumer survey. By this logic the report intended to prove that game broadcasting is indeed proper usage of game and benefits the gaming industry. Furthermore, the report also alleged that YY's live broadcasting of Fantasy Westward Journey II is not a substitute for the game itself, either. Therefore, organizing broadcasting such a game will not hinder the development of the game industry. Moreover, the economics report relied on the commercial value game broadcasting has created to conclude that the percentage of the total value anchors generated is much higher than the percentage of the total value that the game produced. Following this logic, leaving the copyright to the game developers will jeopardize the growth of the game broadcasting industry.

NetEase, instead, retained its own expert team to challenge the findings in the survey as well as in the economic report. NetEase's expert argued for the flaws in the survey methods, such as unrepresentative samples and limited sample size, misleading survey design and questionable reliability of the online survey. Broadcasting and game are both complementary and substitutive, where the net effect is an empirical question. It may depend on individual games and the different stage in the game's life cycle. Given that the Fantasy Westward Journey II has been operated for over fifteen years and are quite matured and well penetrated among the game players, the marginal benefit of advertisement is limited. It's questionable if broadcasting the game will increase the revenue of the game. The example in the YY's economic report used the anchor's revenue data of another game King's Glory rather than Fantasy Westward Journey II. Such data cannot reflect the revenue distribution of the game involved in the case.

The High Court did not support the findings in the economics report and the consumer survey submitted by YY. Instead, the High Court concluded that the logical flaws of the statistical analysis in YY's economic report negated the basis that this case should rely on. The Fantasy Westward Journey game series have become quite popular and have a stable base of game players after several years of operation. The alleged live broadcasting conduct has limited promotional effect for Fantasy Westward Journey II. The fact that the top anchors generate a majority of broadcasting revenue does not mean that live broadcasting revenue mainly comes from anchors. The High Court concluded that any promotion and distribution of games may have certain effect on the game itself but does not mean the copyright owners' right should be ignored. Even though game broadcasting may improve the distribution of games, it's not sufficient to deny the game developers' copyrights.

¹⁰ The National People's Congress of the People's Republic of China, "Copyright Law of the People's Republic of China," November 19, 2020, <http://www.npc.gov.cn/npc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml>.

¹¹ See the second instance judgement of NetEase v Huaduo, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 137, December 10, 2019, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXS4/index.html?docId=8c109eabfe124d6a987eab3100fe7b13>.

B. Anti-Competitive Issues

YY filed an antitrust case against NetEase at the Guangzhou Intellectual Property Court as a strategic response to NetEase's allegation of YY's unfair competition conduct. This is not something new and has often been used in private litigations in China. For example, in the landmark series of cases between Qihoo 360 and Tencent in 2011, Qihoo 360 used the same strategy alleging that Tencent abused its dominant position as a revenge to fight back the unfair competition claim brought by Tencent.¹²

In the *YY v. NetEase* antitrust case, the main issues include:

- i) whether NetEase has bundled its NetEase CC Live Broadcasting software when offering Fantasy Westward Journey II to its game users, and
- ii) whether NetEase prohibited live broadcasting users from using non-NetEase CC Live Broadcasting software or other game live broadcasting platforms which are not licensed by NetEase to broadcast Fantasy Westward Journey II.

When evaluating the antitrust matter, the High Court stated that the relevant market of this case is the network game service market. In such a market, NetEase's market share was below 50 percent which cannot be termed as a dominant firm. Therefore, NetEase's bundling and exclusionary conducts cannot constitute abuse of dominance.¹³

1. Market Definition

The plaintiff, YY, claimed that the network game service market of Fantasy Westward Journey II should be an independent relevant market, which is also regarded as a typical aftermarket. The Guangdong High Court disagreed with YY's claim that a network game service market of a single game can constitute an independent relevant market given that i) the lock-in effect of game users is very limited; ii) the content competition and dynamic competition among game developers are quite intense; iii) the restriction of users to switch to other games is very limited; vi) the plaintiff failed to demonstrate that the lock-in effect of Fantasy Westward Journey II has foreclosed competition.¹⁴

To support YY's market definition, YY's expert used SSNIP test to show that Fantasy Westward Journey II increased its price from 4 points per hour to 6 points per hour in 2013. The search of Fantasy Westward Journey II in Baidu Search has dropped 10 percent. If the lost users are estimated as 10 percent, NetEase's revenue increase is 35 percent due to such a price increase. YY's expert considered this simple analysis proves that the network game service market of Fantasy Westward Journey II constitutes a separate relevant market.

NetEase's expert refuted such an SSNIP test and emphasized that competition in the game market can be reflected in many kinds of non-pricing competition such as quality, innovation, service, consumer experience etc. Simply relying on SSNIP in such an industry will not deliver reliable results. NetEase's expert found that the price increase of Fantasy Westward Journey II is a reasonable price adjustment as a result of inflation, price increase of its related products, and significant cost increase of game development. Furthermore, technology is well implemented in the network game market and talent movement is frequent. There is no significant difference among the hardware used by game developers. Meanwhile the investment funding is bountiful in the capital market in China and any existing or potential supply substitutes may emerge quickly in the market. Those facts all support that NetEase did not possess any market power to prevent other competitors from entering the market.

The High Court relied on demand substitute to evaluate the relevant market.¹⁵ First, the High Court analyzed the product characteristics and functions and found that Fantasy Westward Journey II is not different from other popular games. Second, the High Court analyzed the prices and did not find any evidence of significant pricing differences of Fantasy Westward Journey II from other games, and emphasized that content

¹² See the first instance judgement of *Qihoo 360 v. Tencent*, Guangdong High People's Court, Civil Judgment (2011) Yue Gao Fa Min San Chu No. 2, March 20, 2013. Dr. Vanessa Yanhua Zhang along with Global Economics Group's experts Prof. David S. Evans and Howard H. Chang assisted Tencent in the antitrust matter.

¹³ See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

¹⁴ See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

¹⁵ See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

and services are the important criteria when users choose among different games. Third, the High Court analyzed the impact of distribution channels on demand and found that like other games, Fantasy Westward Journey II needs game distribution platforms to be launched to the users or downloaded from its official website. Given that they use the same distribution channels, this doesn't lead to a different impact on users' choices. Last, the High Court also relied on the survey in the iResearch's 2017 China Network Game Industry Research Report and found that the demand substitution among network games is quite high.

The High Court further discussed supply substitution and found that there is no significant technology, capital and regulatory barriers in the network game services market. Therefore, the High Court did not support YY's expert opinion that the R&D cost is high, relevant knowledge is difficult to acquire, and the risk of IPR infringement is high.¹⁶

Regarding the SSNIP test done by YY's expert, the High Court found that the price increase happened after NetEase had kept its price constant for ten years during which the purchase power had changed significantly due to inflation. It's not rigorous to conduct a simple SSNIP test based on those conditions. Even if a SSNIP test could be conducted, YY did not produce a decent test. The search results of Baidu Search can be affected by many factors, especially susceptible to the influence of recent headline news events. Using Baidu search results to estimate the revenue gain after NetEase's price increase is not reliable. The High Court therefore did not support the SSNIP test result presented by YY's expert and confirmed the relevant market of the case should be the network game service market.

Both YY and NetEase have no dispute over the geographic market which is China mainland market.

2. Market Dominance

The next question is whether NetEase possesses a dominant position in the relevant market. Given that YY has defined a wrong relevant market, the evidence YY provided to support that NetEase has a 100 percent market share of the network game service of Fantasy Westward Journey II was not accepted by the High Court. Instead it evaluated NetEase's market share of network game services, market competition, NetEase's ability to control price, quantity and other trading conditions, NetEase's financial and technology conditions, and the difficulties of market entry.¹⁷

The High Court first assessed NetEase's market share and used two data sources to crosscheck the results. One is from China Game Publisher Committee,¹⁸ Gamma Data, and IDC. The other is from iResearch. Both data sources proved that NetEase's market shares are well below the presumed single firm dominance threshold 50 percent. Market share is not the only criterion to evaluate market dominance. Second, the High Court further looked at the market competition of the relevant product market and found that competition is intense and games with premium quality will replace inferior ones. Third, the High Court affirmed that game players have freedom to choose from different games which leave NetEase no ability to control product prices, quantities and quality. Users can choose to play or not to play games, or choose from a large number of games. Fourth, there are many other competitors such as Tencent, 37Games, Perfect World, etc. The High Court found no evidence to prove that NetEase possessed market dominance. Last, there are no obvious entry barriers from the technological and regulatory perspectives. The High Court supported that competition in this case mainly focuses on innovation such as competition on talent and innovative ideas.

Therefore, the High Court concluded that NetEase did not possess any market dominant position in the relevant market.

¹⁶ See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

¹⁷ See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

¹⁸ Official website www.cgjgc.com.cn.

3. Abuse of Dominance

Although YY has alleged that NetEase restricted game players to broadcast Fantasy Westward Journey II on YY's platform and bundled NetEase CC Live Broadcasting software with Fantasy Westward Journey II, the High Court did not accept its claim that such conducts violated bundling or restriction of trade without legitimate reasons. Instead, the High Court stated that abuse of dominance should be based on the basis that the firm has market dominant position. Given that NetEase has no dominant position in this case, bundling Fantasy Westward Journey II and NetEase CC software is in line with traditional industry practices and consumption habits. Therefore, the High Court concluded that such a bundling/tying conduct did not foreclose competition in the tied market, and is not in violation of the Anti-Monopoly Law.¹⁹

IV. POLICY IMPLICATIONS

The unfair competition case in our view essentially boils down to copyright protection of original content during live broadcasting. The High Court ruling established the precedent that animation pictures embedded in games are indeed considered as copyrighted works and thus warrant protection. This is a landmark legal development that will most likely impact the business model and revenues of the live broadcasting industry. Once this is established, the second issue of the lawsuit with respect to whether broadcasting of copyright content without authorization is considered proper use would then have an obvious answer in consideration of the huge amount of revenues brought in during the broadcasting process. It would only be expected of the High Court to rule in NetEase's favor, since Article 47 of China Copyright Law provides that "radio stations and TV stations have the right to prohibit others from rebroadcasting the radio or TV broadcasted by these stations."²⁰ Certainly, there is an analogy that can be drawn here.

The implication of the antitrust case is more profound, as it harbingers in a way a more interventionist approach by the High Court when it comes to regulating the Internet economy in general and the game industry in particular, in accordance with quite a few recent administrative actions by the central government in China against big Internet platform companies. This is against the larger political backdrop of the government's step-up antimonopoly campaign in the space of the digital economy in 2020. For a long time, the prevailing regulatory philosophy in China with respect to the Internet industry has been of laid-back and tolerance, mainly based on the dynamic competition argument, which was first postulated by Schumpeter to describe industries that see "perennial gale of creative destruction."²¹ This argument was frequently cited to justify lax Internet regulation so as to facilitate its further development. No more, as the political wind started to change recently. The new draft guideline for stricter regulation of Internet platform companies has been circulated by SAMR for public comments since November 10, 2020.²²

Nevertheless, the High Court in this case was not swept away by the political climate to rush to judgment, but instead, still adopted the traditional antitrust analytical framework to judge this case. The High Court's analytical framework starts with the relevant market definition, and this definition could be a landmark definition for many years to come for the game industry.

In fact, the High Court's determination of the relevant market definition sets such a precedent in the game industry that is probably equally profound as this case's political implication. That is, a game of its own, no matter how popular it is and how addictive it can be, cannot qualify as a separate independent relevant market. In the absence of that, a dominant position is then extremely difficult to be established, let alone the abuse of dominance allegation. In this case, without NetEase's dominance assessment, all of the alleged conducts, including bundling and exclusionary dealing in the form of restriction of trade brought concomitantly by YY, all expectedly fell apart.

It is important to mention that the High Court did not specify a separate relevant market for the downstream industry as in a traditional approach for disputes arising from vertical relationships. We think the High Court might have the following two reasons. First, whether the downstream broadcasting industry would constitute an independent relevant market has no bearing on assessing NetEase's conduct legality status under the antitrust framework, because whether NetEase abused its market dominance first hinges upon NetEase's dominance status. Given that

19 See the second instance judgement of *Huaduo v. NetEase*, Guangdong High People's Court, Civil Judgment (2018) Yue Min Zhong No. 552, May 28, 2020, <https://wenshu.court.gov.cn/website/wenshu/181107ANFZOBOXSK4/index.html?docId=51aac1bb823d47cbb575ac0d012414c6>.

20 The National People's Congress of the People's Republic of China, "Copyright Law of the People's Republic of China," November 19, 2020, <http://www.npc.gov.cn/hpc/c30834/202011/848e73f58d4e4c5b82f69d25d46048c6.shtml>.

21 Joseph A. Schumpeter (1942), *Capitalism, Socialism, and Democracy*, at p.84.

22 SAMR, "Anti-Monopoly Guidelines on the Internet Platform Economy (Exposure Draft)," November 10, 2020, http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html.

the High Court did not find NetEase have a dominant position, there is no basis for abuse of dominance. Second, it can certainly be argued that the abuse allegation even with market dominance status could be questionable. But this is an intriguing question, because game broadcasting won't constitute an independent relevant market in our opinion. Many things are put on the broadcasting platforms these days, not just games anymore. Most broadcasting platforms provide game live broadcasting services, so do short-video platforms such as Douyin and Kuaishou. Downstream competition is dynamic and there is no significant entry barrier.

It is also interesting to observe that the High Court's sanctioning of NetEase's restrictive conducts is not only just based on its lack of a market dominance basis, but also based on an IPR protection argument that the copyright owner is entitled to. The copyright owner has the right to choose the licensees as it wishes simply due to the protected copyright content. The High Court's ruling specifically said that such entitlement does not belong to the domain of excluding and limiting competition as related to the abuse of dominance conduct under Article 17 of the Anti-Monopoly Law, but instead belongs to the area of intellectual property right. To a western audience, it may appear to sound odd that abuse of market dominance can happen in the area of IPR protection. But in practice, the bar is quite high for interpreting what is exactly abuse of dominance based on a particular kind of intellectual property right. In any case, the defendant in this case lacks the market dominance basis and thus whether alleged anticompetitive conducts based on copyright qualify as abuse then becomes a moot point. Nevertheless, the High Court seems to indicate the answer would still be a "No" even with market dominance.

V. CONCLUSION

The two unfair competition and antitrust cases between NetEase and YY are landmark cases in the network game industry and broadcasting industry in China. In those cases, the courts' rulings set certain standards for treating unfair competition and anticompetitive conducts in the network game and broadcasting industries. The judges affirmed that enforcing copyright in the network game market should not be considered as one of unfair competition or anticompetitive conducts. Other related conducts upon a market dominant basis but nevertheless not directly related to copyright content may run afoul with the competition law that would call upon rule of reason based on rigorous legal and economic analyses. There will be continuing cases in the future that may have profound impact on the fast-growing game and broadcasting industries in China, bringing about more complicated conducts and issues for IPR and antitrust scholars to debate.

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